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No. 98-9349

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In the Supreme Court of the United States

STEVEN DEWAYNE BOND, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether an officer's handling of the exterior of luggage stored in an overhead baggage area of a passenger bus is a "search" within the meaning of the Fourth Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (J.A. 36-42) is reported at 167 F.3d 225. The orders of the district court denying petitioner's motion to suppress (J.A. 20-25) and his motion for reconsideration (J.A. 26-28) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 8, 1999. The petition for a writ of certiorari was filed on May 10, 1999 (a Monday), and certiorari was granted, limited to question 1 presented by the petition, on October 12, 1999. 120 S. Ct. 320-321. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV.

STATEMENT

Following a bench trial in the United States District Court for the Western District of Texas, petitioner was convicted of possessing methamphetamine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and of conspiring to commit that offense, in violation of 21 U.S.C. 846. He was sentenced to 57 months of imprisonment, to be followed by three years of supervised release. J.A. 29-32. The court of appeals affirmed. J.A. 36.

1. On July 17, 1997, petitioner was a passenger on a Greyhound bus when it stopped at the permanent Border Patrol checkpoint at Sierra Blanca, Texas. J.A. 20, 36-37. The bus, with about 45 passengers on board, was nearly full. Tr. 25, 67. The passengers' luggage was stored in overhead bins above the seats.[1] Because of the large number of passengers on board the bus, the bins had "a lot" of luggage in them. Tr. 80.

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[1] As the court of appeals noted, the record is unclear as to whether the overhead luggage bins on the bus were of the open or closed type. J.A. 38 n.1. See also J.A. 9.

During the stop, Border Patrol Agent Cesar Cantu boarded the bus and checked the immigration status of the passengers, moving from the front of the bus to the rear. J.A. 20-21, 37. See also J.A. 8. By the time Agent Cantu reached the back of the bus, he was satisfied that all of the passengers were lawfully in the United States. J.A. 9, 37. Because the bus had no rear door, Agent Cantu returned to exit through the front. J.A. 41. See also J.A. 9, 27.

As he walked toward the front of the bus, Agent Cantu "checked the luggage racks above the heads of the seated passengers" and, "on occasion, he * * * felt the suitcases, clothing bags, backpacks or other items contained in the luggage rack." J.A. 21. See also J.A. 27, 37. According to the district court:

> As [Agent Cantu] came to [petitioner's] row, something about a softsided green cloth bag in the overhead compartment attracted his attention. He touched the outside of the bag, and could feel a bricklike object.

J.A. 27. See also J.A. 11, 21. Based on his experience, Agent Cantu suspected that the brick-like object might be a package of narcotics. J.A. 21, 27. See also J.A. 12.

Accordingly, Agent Cantu asked who owned the bag, and petitioner acknowledged that the bag was his. J.A. 21, 27, 37. See also J.A. 13. After a short conversation, petitioner—who seemed nervous—consented to a search of the contents of the bag. *Ibid.* Inside the bag, in the leg of a pair of pants, Agent Cantu discovered a brick of methamphetamine measuring approximately six or seven inches long by four or five inches wide; the brick weighed 1.3 pounds. J.A. 21-22.

After petitioner was advised of his *Miranda* rights, see *Miranda* v. *Arizona*, 384 U.S. 436 (1966), he told

Agent Cantu that he was delivering the methamphetamine from California to Little Rock, Arkansas. J.A. 21-22, 37. Later that same day, petitioner confessed again, this time to a different law enforcement officer. J.A. 22, 24; Tr. 47-49.

2. Petitioner moved to suppress the evidence obtained from his bag and his subsequent statements. The district court held a hearing, at which Agent Cantu and petitioner both testified.

Agent Cantu explained that, as he walked down the aisle of the bus, he squeezed petitioner's green canvas bag and felt a relatively solid, brick-shaped object inside. J.A. 10-11. He described his squeeze of the bag as "hard," but not so hard that it would break anything. *Id.* at 15. Petitioner's testimony did not contradict Agent Cantu's. He stated that, after Agent Cantu "reached for" his bag, Agent Cantu "shook it a little, and squeezed it, and then sniffed it, and then * * * asked me if it was my bag." J.A. 18.

Following the hearing, the district court denied petitioner's motion to suppress. J.A. 20-25. The district court found that Agent Cantu, in the course of making an authorized inspection of the bus and its luggage areas, "felt the outside of [petitioner's] softside green cloth bag" and that "[i]n doing so, he felt the presence of a solid mass reminiscent of a brick." J.A. 23. "It is well settled," the district court concluded, "that the minimally intrusive touching of the exterior of a bag located in the luggage compartment of a common carrier is neither a search nor a seizure within the meaning of the Fourth Amendment." J.A. 23 (citing *United States* v. *Lovell*, 849 F.2d 910 (5th Cir. 1988), and *United States* v. *Garcia*, 849 F.2d 917 (5th Cir. 1988)).[2]

Petitioner filed a motion for reconsideration, which the district court denied. J.A. 26-28. After rejecting petitioner's contention that Agent Cantu's inspection of the luggage racks caused the bus to be stopped for an unreasonable period of time, J.A. 26-27, the district court reiterated that Agent Cantu's "minimally intrusive touching of the exterior of" petitioner's green canvas athletic bag in the overhead luggage compartment "was neither a search nor a seizure within the meaning of the Fourth Amendment." J.A. 28.

Following a bench trial on stipulated facts, petitioner was convicted on both counts charged. J.A. 37, 29-35.

3. Petitioner appealed, and the court of appeals affirmed. J.A. 36-42. The court of appeals first rejected petitioner's claim that Agent Cantu, in touching the exterior of petitioner's luggage, had conducted a "search" within the meaning of the Fourth Amendment. Relying on the principle that "[w]hat a person knowingly exposes to the public * * * is not a subject of Fourth Amendment protection," J.A. 38 (quoting *Katz* v. *United States*, 389 U.S. 347, 351 (1967)), the court of appeals concluded that petitioner had knowingly exposed the exterior of his canvas bag to touching by others. Petitioner, the court observed, had stored his gym bag in the overhead luggage bin, a common area of the Greyhound bus, where "it was foreseeable that [it]

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[2] The district court did suppress evidence from a search of the backpack of petitioner's traveling companion and co-defendant, Jason Wiggs. The district court found that Wiggs, unlike petitioner, had been arrested without probable cause before methamphetamine was found in Wiggs's luggage. J.A. 24-25.

would be squeezed, moved, and manipulated by others." J.A. 38. As the court explained:

> On common carriers, passengers often handle and manipulate other passengers' luggage while stowing or retrieving their own luggage. By placing his bag in the overhead bin, [petitioner] knowingly exposed it to the public and, therefore, did not have a reasonable expectation that his bag would not be handled or manipulated by others.

J.A. 38-39 (citing *United States* v. *McDonald*, 100 F.3d 1320, 1327 (7th Cir. 1996), cert. denied, 520 U.S. 1258 (1997); *United States* v. *Guzman*, 75 F.3d 1090, 1095 (6th Cir.), cert. denied, 519 U.S. 906 (1996); *United States* v. *Harvey*, 961 F.2d 1361, 1364 (8th Cir.), cert. denied, 506 U.S. 883 (1992)). Petitioner, the court of appeals further noted, "[c]oncede[d] that other passengers had access to his bag." J.A. 39.

The court of appeals also rejected petitioner's reliance on *United States* v. *Nicholson*, 144 F.3d 632, 639 (10th Cir. 1998). In that case, the Tenth Circuit held that a law enforcement officer's manipulation of luggage stored in an overhead luggage bin constituted a search because the officer's handling of the bag, unlike the handling that might be expected by a fellow passenger, was designed to reveal contraband. See J.A. 40 (characterizing *Nicholson*). For Fourth Amendment purposes, the court of appeals held, it was irrelevant that Agent Cantu's handling of petitioner's bag was calculated to detect contraband. J.A. 40 (citing *California* v. *Ciraolo*, 476 U.S. 207 (1986)).

The court of appeals also rejected petitioner's claim that Agent Cantu discovered the methamphetamine during an unlawful detention of the bus, after the immigration inspection had been completed. J.A. 40-41.

Pointing out that there was "no evidence that Agent Cantu's inspection of the overhead luggage compartment delayed the bus' departure more than an additional one or two minutes," the court concluded that "the trivial delay caused by Agent Cantu's inspection did not violate the strict limits of a border checkpoint stop." J.A. 41.

SUMMARY OF ARGUMENT

I. A Fourth Amendment search occurs when a government official makes observations that infringe on a legitimate expectation of privacy. Such an infringement is shown only when an individual has "manifested a subjective expectation of privacy," and society accepts that privacy expectation "as objectively reasonable." *California* v. *Greenwood*, 486 U.S. 35, 39 (1988). In contrast, "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz* v. *United States*, 389 U.S. 347, 351 (1967).

In this case, Agent Cantu acquired, through the sense of touch, only such information about petitioner's soft-sided bag as was made available to the public. Petitioner chose to transport his relatively large brick of narcotics halfway across the country inside a soft, canvas athletic bag—a bag that had the obvious potential of revealing the presence of solid objects inside when compressed—and then placed that soft bag on the bus's overhead rack, an area accessible to and shared with other passengers on the bus. It is well known that passengers on common carriers and common carrier employees often move, push, compress, and otherwise handle luggage stored in shared areas like overhead racks as they attempt to make room for or remove other bags.

Under those circumstances, petitioner had no reasonable expectation that the brick-like object in his canvas bag—which occupied one third of his bag's length and one third of its width—would remain undetected by the routine handling to which the bag was exposed. Indeed, Agent Cantu noticed the brick merely by squeezing petitioner's soft gym bag, hard but not so hard as to break anything inside, J.A. 10-11, 15, 23, an action the district court described as "minimally intrusive," J.A. 28. It is not a Fourth Amendment search for a law enforcement officer to make the same observations that could have been made by any other passenger or other member of the public handling the bag in a reasonably foreseeable manner.

II. There is no basis for treating Agent Cantu's handling of the bag as a Fourth Amendment search on the theory that his actions were physically intrusive or excessively revealing of the contents of the bag. The intrusion was no more than petitioner could expect from the public. Having exposed his baggage to such handling by a host of others, he cannot claim an unwanted physical invasion when similar action is taken by the police—any more than a store owner who invites the public to shop can complain about similar entry by the police, or the former owner of garbage put out in a can for collection can complain if the can is physically opened and inspected by the police. Once a possession is opened to public inspection, the police may inspect it as well, even if that may involve physical entry. And the fact that tactile inspection of a bag's exterior may reveal information about its contents no more establishes a search than when officers standing on a public sidewalk or in open fields make observations of the contents of a car or a house. Cf. *United States* v. *Dunn*, 480 U.S. 294 (1987) (observation through a window);

Texas v. *Brown*, 460 U.S. 730 (1983) (observation of the interior of a car).

Petitioner is not assisted by the fact that a *Terry* frisk—the touching of a person—is a search. The touching of a bag is quite different from the touching of one's person. Bags may be placed in locations where they are knowingly exposed to public handling and to consequent tactile observation; but it would be a rare case in which a person's body is said to be so exposed.

In any event, the handling of petitioner's bag in this case was not "physically intrusive" or particularly revealing of its contents. Handling a bag does not penetrate the physical barrier that the bag creates between its contents and the rest of the world. And the information that can be learned from such handling extends only to the presence of large and relatively solid items positioned in a way that exposes them to observation by the sense of touch from the outside, *i.e.*, those items anyone handling the bag might have detected.

Finally, Agent Cantu's actions cannot be labeled a search on the theory that they involved a purposeful manipulation in contrast to the sort of "casual" or "incidental" contact that might be expected from other members of the public. The purpose or motive of the officer has no bearing on whether there has been a "search." And once an item is exposed to inspection, this Court has held, officers may make more extensive, more thorough, and more focused observations than would ordinarily be made by members of the public. See *United States* v. *Knotts*, 460 U.S. 276 (1983) (surveillance of movements through public streets for extended period of time); *California* v. *Ciraolo*, 476 U.S. 207 (1986) (focused aerial observation); *Texas* v. *Brown*, *supra* (intentional effort to see inside car by changing position and bending down).

ARGUMENT

AN OFFICER'S TOUCHING OF THE EXTERIOR OF LUGGAGE STORED IN AN OVERHEAD LUGGAGE BIN SHARED WITH OTHER PASSENGERS IS NOT A SEARCH WITHIN THE MEANING OF THE FOURTH AMENDMENT

I. The Handling Of Petitioner's Soft Bag Was Not A Search Because Petitioner Knowingly Exposed It To Public Handling

A. What One Knowingly Exposes To Public Observation Is Not Subject To Fourth Amendment Protection

Not all observations made by police, through sight or through other senses, implicate the Fourth Amendment. 1 Wayne R. LaFave, *Search and Seizure*, § 2.1(a), at 380 (3d ed. 1996). Instead, an officer's observation infringes on a constitutionally protected privacy interest, and constitutes a "search" within the meaning of the Fourth Amendment, only if two conditions are met. First, the individual claiming infringement must have "manifested a subjective expectation of privacy"; second, society must accept that expectation "as objectively reasonable." *California* v. *Greenwood*, 486 U.S. 35, 39 (1988); *California* v. *Ciraolo*, 476 U.S. 207, 211 (1986); *Smith* v. *Maryland*, 442 U.S. 735, 740 (1979).

Consistent with that approach, this Court has long held that "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz* v. *United States*, 389 U.S. 347, 351 (1967); *Ciraolo*, 476 U.S. at 213; *Greenwood*, 486 U.S. at 41. Consequently, this Court has also recognized that law enforcement officers "may see what may be seen 'from a public vantage point'"

without triggering constitutional concerns. *Florida* v. *Riley*, 488 U.S. 445, 449 (1989) (plurality opinion) (quoting *Ciraolo*, 476 U.S. at 213). As this Court explained in *Ciraolo*, 476 U.S. at 213, "the mere fact that an individual has taken measures to restrict some views" does not "preclude an officer's observations from a public vantage point where he has a right to be." See also *Greenwood*, 486 U.S. at 40 (garbage exposed "to the public sufficiently to defeat the[] claim of Fourth Amendment protection"); *United States* v. *Dunn*, 480 U.S. 294, 303-304 (1987) (even if building "could not be entered * * * without a warrant," observation of interior made from outside, while standing in open fields or a public place, not a Fourth Amendment search).

The distinction between matters opened to public observation, and those protected against it, is well established. Over a century ago, in *Ex Parte Jackson*, 96 U.S. 727, 733 (1877), this Court explained that postal inspectors could review the contents of unsealed pamphlets and other open printed materials placed in the mail, and could examine sealed letters and packages "as to their outward form and weight," but held that the Fourth Amendment barred them from opening printed materials "closed against inspection." Fifty years later, the Court employed similar analysis in *United States* v. *Lee*, 274 U.S. 559 (1927), to conclude that using a searchlight to observe contraband on a ship's deck was not a "search" within the meaning of the Fourth Amendment. See *id.* at 561. The contraband, the Court explained, was sitting "on the deck" in public view; the observations were made before the boat was boarded; and there was no "exploration below decks or under hatches." *Id.* at 563. Under those circumstances, "no search on the high seas [was] shown." *Ibid.*

In the seven decades since *Lee*, this Court repeatedly has applied the distinction between items protected against observation and those exposed to public perception. For example, in *United States* v. *Knotts*, 460 U.S. 276, 281 (1983), the Court approved extended police surveillance of a car's movements, using a beeper, because a "person travelling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." *Id.* at 281. See *United States* v. *Karo*, 486 U.S. 705, 715 (1984) ("The information obtained in *Knotts* was 'voluntarily conveyed to anyone who wanted to look.'"). The Court likewise has unanimously held that the police may use a flashlight to examine a car's interior through the window, because there is no reasonable privacy expectation in areas "which may be viewed from outside the vehicle by either inquisitive passersby or diligent police officers." *Texas* v. *Brown*, 460 U.S. 730, 740 (1983) (plurality opinion); *id.* at 746 (Powell, J., concurring) (contraband concededly "observed in the course of a lawful inspection"); *id.* at 750 (Stevens, J., concurring) ("I agree that the police officer invaded no privacy interest in order to see the balloon."). And the Court has held that the police may constitutionally look through garbage left for pickup in a closed container outside the home, because the garbage is "exposed * * * to the public sufficiently to defeat the[] claim to Fourth Amendment protection." *Greenwood*, 486 U.S. at 40.

Even with respect to the home and its curtilage—the areas for which constitutional protection is at its apogee—this Court consistently has held that police observation from publicly accessible vantage points does not constitute a Fourth Amendment search. See *Riley*, 488 U.S. at 449 ("[T]he home and its curtilage are not necessarily protected from inspection that involves

no physical invasion.") (plurality opinion). In *Ciraolo*, *supra*, for example, the officers used an airplane to view the backyard of a house where two tall fences prevented ground-level observation. See 476 U.S. at 209, 211. Even on the assumption that the defendant's backyard was subject to the same protection as the home itself, the Court explained, air travel is now a familiar part of modern life, and "any member of the" flying public "who glanced down could have seen everything that these officers observed." *Id.* at 213-214. The Court thus "readily" concluded that the defendant's "expectation that his garden was protected from such observation is unreasonable and is not an expectation that society is prepared to honor." *Ibid.* See also *Riley*, 488 U.S. at 450-451 (plurality opinion) (although occupant "intended and expected that his greenhouse would not be open to public inspection," expectation not reasonable because any "member of the public could legally have been flying over" and seen inside); *id.* at 453 (O'Connor, J., concurring); *Minnesota* v. *Carter*, 525 U.S. 83, 104-105 (1998) (Breyer, J., concurring) (officer's observation of apartment from public vantage point, whether through "gaps" in blinds or blinds "pulled the 'wrong way,'" not an unreasonable search); *Smith* v. *Maryland*, 442 U.S. at 742 (no reasonable expectation of privacy in telephone numbers dialed because that information is conveyed to a third party).

B. Luggage Placed In Overhead Racks Is Knowingly Exposed To Public Handling And The Observations That Can Be Made Through Such Handling

1. The foregoing principles control this case. Petitioner chose to transport his relatively large brick of narcotics halfway across the country inside a soft, canvas athletic bag, and chose to place that soft bag on

the bus's overhead rack, an area accessible to and shared with other passengers on the bus. It is common knowledge, born of "mundane observation," *People* v. *Santana*, 73 Cal. Rptr. 2d 886, 888 (Ct. App. 1998), that passengers on common carriers and common carrier employees often handle—sometimes roughly—luggage stored in shared areas. "Any person who has travelled on a common carrier knows that luggage placed in an overhead compartment is always at the mercy of all people who want to rearrange or move previously placed luggage in order to squeeze additional luggage into the compartment or remove previously placed luggage." *United States* v. *McDonald*, 100 F.3d 1320, 1327 (7th Cir. 1996), cert. denied, 520 U.S. 1258 (1997). Indeed, other passengers or bus line employees may handle stowed bags in myriad ways—they might grab them from any number of angles while removing them from the rack; compress or squeeze them by pushing on them with the palms of their hands in an effort to make room for additional luggage; or pat them and press them against other bags to make them fit or ensure that they are snug in the rack. Thus, once a defendant places his luggage in "an overhead rack on a common carrier * * * accessible to other passengers, and where other passengers also stow[] their luggage":

> It is likely that in retrieving or stowing their own bags, other passengers * * * would have to move, touch, or push [the defendant's] bags, and would in all probability feel the outside of [his] bags in doing so. [Such a person] can thus be said to have knowingly and voluntarily exposed the *exterior* of [his] bags to being physically touched by other persons. In other words, [the defendant cannot] have a reasonable expectation of privacy that the exterior of [his] luggage would not be felt, handled, or manipulated by others.

Id. at 1326. See J.A. 38-39 (it is "foreseeable that" bags in overhead rack "would be squeezed, moved and manipulated by others," because "passengers often handle and manipulate other passengers' luggage, while stowing or retrieving their own").

The correctness of those observations is confirmed by experience. Even a quick glance through contemporary travel accounts reveals acute public awareness that luggage stowed in shared compartments on common carriers is regularly handled, compressed, pushed, and shoved—even crammed or pounded—by other passengers and by common carrier employees seeking to make room for or retrieve other bags, or to ensure that all bags are secure in the rack.[3] And rough handling of

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[3] See, *e.g.*, T. Massingill, *Decade of Prosperity Means More Fliers, More Complaints*, Knight-Ridder Tribune Bus. News, Mar. 28, 1999 (United Airlines spokesman notes that "hundreds of passengers have to cram, recram and then remove their bulky carry-on bags"); J. Flinn, *Confessions of a Once-Only Carry-On Guy*, S.F. Examiner, Sept. 6, 1998, at T2 (reporting that the flight attendant "rearranged the contents of three different overhead compartments to free up some room, and together we lifted, shoved and pounded until my bag squeezed in."); *Carry-on Troubles*, Kan. City Star, June 1, 1999, at B6 ("overhead bins are filled to the brim," and the "flight crews help[] passengers cram the bins full, smashing everything else that is safely in place."); M. Eagen, *Familiar Anger Takes Flight With Airline Tussles*, Boston Herald, Aug. 15, 1999, at 8 ("It's dog-eat-dog trying to cram half your home into overhead compartments."); G. Withiam, *About Those Carryons*, Cornell Hotel & Rest. Admin. Q., Feb. 1, 1998, at 6 (late-arriving passengers "attempt[] to find space in the overhead compartment, crushing your carefully stowed bag in the process"); Rocky Mountain News Television broadcast, *United's New Carry-on Rule Takes Off* (May 16, 1998) ("Take this bag and

luggage during long-haul travel is not a modern phenomenon, but has been documented in travel literature from ages past.[4] For that very reason, travelers

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shove it—or squeeze it, or fold it—whatever it takes to get it in that overhead bin."); G. Barker, *Internet Crosstalk at Issue: Carry-on Bags for Air Travelers*, The Fort Worth Star-Telegram, Nov. 23, 1997, at 4 (People "try to jam [their possessions] into the overhead storage, crushing everything that someone else has put there."); A. Knowles, *Get the Complete Picture*, Datamation, Oct. 1, 1997, at 74 (reporting typical trip in which the traveler "discover[s] that [his] overhead compartment is full" but "stuff[s] [his] luggage into it anyway"). See also S. Bennett, *Airing Out Miles and Miles of Aggravations When Flying*, Pittsburgh Post-Gazette, Feb. 3, 1999, at S5; D. Field, *Passengers' Horror Stories Illustrate Airlines' Ills*, USA Today, Dec. 14, 1999, at 12B; *Oh, What A Carry On: Might It Be Time for Airlines to Restrict Both Luggage and Children on Planes?*, The Economist, Dec. 18, 1999.

[4] One travel account from the late nineteenth century warns that anyone planning to visit the United States should "provide himself with such a strong portmanteau as will resist the notorious 'baggage-smashers,' with a smaller one for use on the rail." Samuel Reynolds Hole, *A Little Tour In America* 18 (1895) (1971 reprint). Travel by stage coach was more brutal still, for luggage and passenger alike. Any luggage that could not be fastened to the exterior was placed on the floor of the coach, resulting in constant collisions between the luggage and travelers as the stage coach lurched over the rough roads. See, *e.g.*, 2 John Bernard, *Retrospections of America 1797-1811*, at 33-34 (1887) (*quoted in* Oliver W. Holmes & Peter T. Rohrbach, *Stagecoach East* 42 (1983)) ("[T]he floor was lumbered with a mail-bag and * * * earthen and hardware jugs * * * and other articles * * * which had the effect before the vehicle was ten minutes in motion, of dyeing our shins all the colours of the rainbow."); 2 John M. Duncan, *Travels Through Part of the United States and Canada in 1818 and 1819*, at 6 (1821-1822) (*quoted in* Holmes & Rohrbach, *supra*, at 42) ("The heavier kinds of boxes and trunks are fastened behind, upon the frame of the carriage, but the smaller articles and the mail bag are huddled under the seats in the inside, to the great annoyance of the passengers, who are frequently forced to sit with their knees up to

concerned about such handling—and the consequences of soft bags being grabbed, compressed or squashed—have long had the option of using hard luggage. See Deborah Shinn et al., *Bon Voyage: Designs for Travel* 16, 18, 21, 23, 25, 27, 29, 52 (1986) (photographs and drawings of hard-sided carrying containers and other hard luggage used in ancient Egypt and the 14th through the 18th centuries). See also note 4, *supra*.

Consistent with those observations, federal courts have agreed that a passenger who leaves his bag in a publicly accessible part of a common carrier, like an overhead rack, knowingly exposes it to at least some degree of public touching, feeling, handling, and movement—and that, as a result, police handling of such luggage does not necessarily constitute a "search" within the meaning of the Fourth Amendment. See, *e.g.*, *McDonald*, 100 F.3d at 1325 ("[W]e agree with other courts of appeal that have held that the reasonable expectation of privacy inherent in the contents of luggage is not compromised by a police officer's physical touching of the exterior of luggage left exposed in the overhead rack of a bus."); *United States* v. *Guzman*, 75 F.3d 1090, 1095 (6th Cir.) ("[D]efendant had no reasonable expectation of privacy in the exterior of his bag when it was on the open luggage rack of a commercial bus."), cert. denied, 519 U.S. 906 (1996); *United States* v. *Harvey*, 961 F.2d 1361, 1364 (8th Cir.) (Because "[i]t is not uncommon for the bus driver or a fellow passenger to rearrange the baggage in the overhead compartment or to temporarily remove the baggage and place it in a seat or in the aisle in order to rearrange and

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their mouths, or with their feet insinuated between two trunks, where they are most lovingly compressed whenever the vehicle makes a lurch into a rut.").

maximize the use of limited compartment space," passengers "have no objective, reasonable expectation that their baggage will never be moved once placed in an overhead compartment."), cert. denied, 506 U.S. 883 (1992);[5] cf. *United States* v. *Garcia*, 849 F.2d 917, 919 (5th Cir. 1988) ("The agents' handling of Garcia's bag was certainly no rougher than could be expected in an airport baggage handling context."); *United States* v. *Bronstein*, 521 F.2d 459, 465 (2d Cir. 1975) (Mansfield, J., concurring) ("It is common knowledge that luggage turned over to a public carrier will be handled by many persons who, although not permitted to open it without the owner's permission, may feel it, weigh it, check its locks, straps and seams to insure that it will not fall apart in transit, and shake it to determine whether the

[5] Even those few decisions that have suppressed evidence discovered from the handling of luggage left in shared parts of a common carrier agree with the general principle that police handling of soft luggage is not necessarily a search. *Nicholson*, 144 F.3d at 637 ("The circuits uniformly agree that an officer's touching of a bag's exterior does not necessarily constitute a search."). As the Tenth Circuit explained in *Nicholson*:

> To be sure, placing a bag in an overhead rack of a commercial bus exposes it to certain intrusions. Seeking to make room for their own articles, other passengers may push and move the bag. Therefore, Defendant had no reasonable expectation that his carry-on would not be touched * * * .

144 F.3d at 639. See also *United States* v. *Gwinn*, 191 F.3d 874, 878 (8th Cir. 1999) ("Of course, not every intrusion with an individual's luggage constitutes a search within the meaning of the Fourth Amendment."); *United States* v. *Gault*, 92 F.3d 990, 992 (10th Cir.) (No search occurred where the information the DEA Agent "obtained from the kick and lift of the bag, its weight and the solidity of its contents, was the same information that a passenger would have obtained by kicking the bag accidentally or by lifting it to clear the aisle."), cert. denied, 519 U.S. 939 (1996).

contents are fragile or dangerous."), cert. denied, 424 U.S. 918 (1976). The decisions of state courts are in accord.[6]

[6] See, *e.g.*, *State* v. *Lancellotti*, 595 N.W.2d 558, 563 (Neb. Ct. App. 1999) ("[P]assengers who place their luggage in the overhead public storage on a commercial carrier can reasonably expect that other passengers will touch, move, or adjust the luggage in order to retrieve or make room for their own luggage."); *State* v. *Quintanilla*, No. A-99-201, 1999 WL 1063085 (Neb. Ct. App. Aug. 11, 1999) (concluding that police handling and feeling of luggage in an overhead rack is not an illegal search). See also *Stanberry* v. *State*, 684 A.2d 823, 832 (Md. 1996) (although the defendant may have "reduced his expectation of privacy by placing his bag on the overhead luggage rack," that reduction did not extend to having his bag opened); cf. *Sprowls* v. *State*, 433 So. 2d 1271, 1271-1272 (Fla. Dist. Ct. App. 1983) (officer's "prepping" bag for dog sniff by "press[ing] his hands against [its] sides, forcing air from within to be expelled" not "a search and seizure" within meaning of State or federal constitution); *People* v. *Burns*, 540 N.Y.S.2d 157, 161, 162 (Sup. Ct. 1989) (because "[w]hat is a reasonable expectation * * * varies with locale," officer's momentary grasp of nylon bag bumped against him in crowded area "not a search in Fourth Amendment terms"), aff'd, 582 N.Y.S.2d 234 (App. Div.), appeal denied, 600 N.E.2d 652 (1992); *Santana*, 73 Cal. Rptr. at 889 ("[W]hen luggage is checked, it is unavoidably subject to manipulation, handling, and compression. * * * That in any given case [the] bag [is] dropped to the ground, pushed hard against other bags or squeezed by an officer is of no constitutional significance."); *Scott* v. *State*, 927 P.2d 1066, 1068 (Okla. Crim. App. 1996) ("Once a bag is released into the custody of the busline by checking it," the owner has "no reasonable expectation that the bag will not be moved or handled."); *State* v. *Peters*, 941 P.2d 228, 232 (Ariz. 1997) (because "luggage turned over to a public carrier will be handled by many persons who, although not permitted to open it * * * , may feel it * * * and shake it," agent's squeezing of checked bag does not violate Fourth Amendment if "neither violent nor extreme"); *State* v. *Millan*, 916 P.2d 1114, 1117 (Ariz. Ct. App. 1996) (similar).

2. Petitioner concedes that, when he placed his soft canvas gym bag in the overhead rack of the bus, he exposed it to public touching and handling. See Pet. Br. 18 (petitioner "may even have expected that other bus passengers would * * * push[] or move[]" his bag "as they stored their own luggage"); J.A. 39 (noting similar concession). Consequently, petitioner could have no legitimate expectation that his soft gym bag would remain untouched and the presence of the brick-like object inside undetected. Any other passenger or bus line employee pushing, compressing, or grabbing petitioner's gym bag (while rearranging stowed bags, making room for other bags, retrieving bags, or ensuring stowed materials are secure in the overhead rack) could have sensed through its soft canvas exterior the same thing that Agent Cantu noted—that there was a hard, brick-like object inside. As one treatise has explained, once "it is conceded that the defendant had 'no reasonable expectation that his luggage would not be moved or handled'" by others, an officer's act of "squeez[ing] a piece of soft-sided luggage and [thereby feeling] the unmistakable outline of a gun" or other contraband does "not constitute a search." 1 LaFave, *supra*, § 2.2(a), at 404-405 (footnotes omitted); cf. *United States* v. *Russell*, 670 F.2d 323, 325 (D.C. Cir.) (gun held to be in "plain view" where officer "felt the outline of the gun" as he lawfully "grasped the paper bag" in which the gun was sitting), cert. denied, 457 U.S. 1108 (1982).

Indeed, given the size of the methamphetamine brick, it is unlikely that anyone handling the bag (including Agent Cantu) might have missed it. Agent Cantu merely squeezed petitioner's bag ("hard" but not so hard as to break anything inside) and in so doing felt a brick-shaped object inside the bag. J.A. 10-11, 15.

See J.A. 27 (district court finding that Agent Cantu "touched the outside of the bag, and could feel a brick-like object."). The brick, which weighed one-and-one-third pounds, occupied one third of the bag's length and one third of its width.[7] As a result, the district court found that Agent Cantu noticed the brick-like object when he "felt the outside of [petitioner's] softside green cloth bag," J.A. 23, an action that was "minimally intrusive." J.A. 28.[8] Because Agent Cantu felt that which anyone else handling the bag might have perceived, his observations did not invade an expectation of privacy that society considers reasonable.

3. Petitioner's claimed expectation of privacy in this case is far less justified than the privacy expectations this Court has rejected as unreasonable in the past. In *Ciraolo* and *Riley*, for example, the defendants took reasonable precautions to protect the areas behind their homes from visual observation, erecting tall enclosures; to protect those areas from the aerial visual observation that occurred would have required extraordinary measures. See *Riley*, 488 U.S. at 454 (O'Connor,

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[7] Agent Cantu testified that the bag was about a foot and half long, a foot high, and a foot wide, more or less. J.A. 12. The brick of methamphetamine was six or seven inches long, and four or five inches wide. J.A. 21.

[8] While Amicus NACDL argues (Br. 7) that the brick was shielded from observation because it was "wrapped" inside a pair of pants, the district court found only that the brick was found "[i]nside *the leg* of a pair of pants." J.A. 21 (emphasis added). Common sense suggests that placing a brick inside a pant leg does not make it any less obvious that it is brick. For similar reasons, NACDL's reliance (Br. 7) on the duct tape that surrounded the brick is misplaced. Duct tape does not disguise the presence of a brick-like object. Instead, together with cellophane or some other wrapping material, it holds the narcotics together in the shape of a brick.

J., concurring) (to preserve privacy against aerial observation would "require individuals to completely cover and enclose their curtilage" and force them "entirely [to] giv[e] up their enjoyment of those areas."). And in *Greenwood*, the defendants had no way to protect their garbage from being observed once it was placed out for pick up. *Greenwood*, 486 U.S. at 55 (Brennan, J., dissenting).

Here, in contrast, petitioner did not employ even ordinary precautions. Nothing prevented petitioner from transporting his narcotics in a hard briefcase, hard luggage, or a cardboard carton, each of which would have protected it from tactile detection during routine handling of baggage. See pp. 16-17, *supra*. But petitioner chose not to do so. Instead, he chose to put his brick of narcotics in a soft gym bag and the gym bag in a shared location where others would touch, push, move, and handle it. When, as here, an individual fails to employ the "precautions customarily taken by those seeking privacy," *Rakas* v. *Illinois*, 439 U.S. 128, 152 (1978) (Powell, J., concurring), he "cannot reasonably expect privacy from public observation." *Riley*, 488 U.S. at 454 (O'Connor, J., concurring).

II. Feeling The Exterior Of Luggage Left Open To Public Touching Is Not A "Search" Of Its Contents

Relying on *Terry* v. *Ohio* and other frisk cases, petitioner argues that Agent Cantu's handling of his luggage must be a search because it was physically intrusive, revealed information about the bag's contents, and exceeded the sort of "casual" or "incidental" contact that petitioner claims to have expected of other passengers. None of those arguments is persuasive.

A. Handling The Exterior Of Luggage Exposed To Public Contact Does Not Violate Reasonable Privacy Expectations

1. As petitioner notes (Br. 7-8), luggage is an "effect" traditionally protected under the Fourth Amendment. But effects, no less than homes or any other form of property, may be observed by the police if they are exposed to public inspection. And petitioner exposed his soft bag to public touching and handling here. See pp. 13-22, *supra*. Petitioner contends that the contact with the exterior of his luggage was physically intrusive, Pet. Br. 10-12, and unduly revealing of the bag's contents, *id.* at 12-15. But even where the particular form of observation or inspection can properly be characterized as "physically intrusive" or revealing, a defendant cannot claim invasion of a reasonable privacy expectation if he has knowingly exposed his property to such consequences. Thus, for example, while police entry into a business is surely "physically intrusive," the owner of a business open to the public cannot complain when government agents enter during normal hours. See, *e.g.*, *Maryland* v. *Macon*, 472 U.S. 463, 469 (1985) ("[R]espondent did not have any reasonable expectation of privacy in areas of the store where the public was invited to enter."). Likewise, an inspection of garbage left out at the curb—which may consist of opening sealed bags and rummaging through them—is "physically intrusive." But the police may conduct such observations where the garbage, because it is left out for collection, is exposed to the public. See *Greenwood*, 486 U.S. at 37-38, 40. See also *Katz*, 389 U.S. at 353 ("[T]he reach of [the Fourth] Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure.").

For the same reason, it makes no difference that Agent Cantu's observations from the outside of the bag may have revealed limited information about what was inside. Pet. Br. 12-15. So too might looking into a house or car through an exposed window, *Dunn*, 480 U.S. at 304 (even if barn enjoyed Fourth Amendment protection, police could peer into it from open fields); *Texas* v. *Brown*, 460 U.S. at 740 (police observation of car's interior not a search because area could be "viewed from outside the vehicle by either inquisitive passersby or diligent police officers"); or observing an enclosed garden or greenhouse from the air, *Ciraolo*, *supra*; *Riley*, *supra*. None of those observations constitutes a search, because each is limited to matters that the defendant knowingly exposed to view or perusal by total strangers or other members of the public. And even though petitioner shielded the items in his gym bag from visual observation by enclosing them in an opaque container, he exposed the rough outlines of some items to tactile observation when he placed his soft-sided bag in a publicly accessible location where others could be expected to handle it. *Cf. Ciraolo*, 476 U.S. at 213 ("[T]he mere fact that an individual has taken measures to restrict some views" does not "preclude an officer's observations from a public vantage point.").

2. Petitioner is mistaken to rely on the fact that a *Terry*-frisk of a person, see *Terry* v. *Ohio*, 392 U.S. 1 (1968); *Minnesota* v. *Dickerson*, 508 U.S. 366, 378-379 (1993), or the act of lifting up a stereo component in an apartment to see its serial numbers, *Arizona* v. *Hicks*, 480 U.S. 321, 324-325 (1987), can be characterized as a "search" within the meaning of the Fourth Amendment. See Pet. Br. 9-11. In neither *Terry*, nor *Dickerson*, nor *Hicks* was there (nor could there be) any contention

that the defendant had knowingly exposed his person or his possessions to the handling and observations that took place.

In fact, *Dickerson* and *Hicks* are both applications of the rule that "a warrantless search must be 'strictly circumscribed by the exigencies which justify its initiation.'" *Hicks*, 480 U.S. at 325 (quoting *Mincey* v. *Arizona*, 437 U.S. 385, 393 (1978)). In *Dickerson*, for example, the police lawfully stopped respondent and conducted a warrantless frisk of his person for weapons pursuant to the rule established in *Terry* v. *Ohio*, *supra*. During the course of the frisk, the police explored a lump in the defendant's pocket *after* having determined that the defendant was not armed. The Court held such further exploration to be unlawful. Because the warrantless intrusion authorized by *Terry* "must be strictly limited to that which is necessary for the discovery of weapons," the Court explained, a "protective search [that] goes beyond what is necessary to determine if the suspect is armed" is not "valid under *Terry* and its fruits will be suppressed." *Dickerson*, 508 U.S. at 336-337. Thus, *Dickerson* addresses whether and when an officer oversteps the limited search authorized under *Terry*. It does not address whether an officer's observation of matters knowingly exposed to public perception constitutes a search in the first instance.

Arizona v. *Hicks*, *supra*, is inapt for the same reason. There, the police entered the defendant's apartment, based on exigent circumstances, to search for a suspect who had just fired a shot through the apartment floor and injured the occupant of the apartment below. 480 U.S. at 323. During the search, an officer lifted up a stereo component and noted the serial numbers on it; the component was then identified as stolen. *Ibid.* The Court held that, because lifting the component was

"unrelated to the objectives of the authorized intrusion" —catching the shooter—and "produce[d] a new invasion of respondent's privacy unjustified by the exigent circumstance that validated the entry," it was unlawful. *Id.* at 325. *Hicks* thus did not involve an instance of knowing exposure. Instead, it concerned the scope of a permissible search of matters otherwise hidden from public perception.[9]

Petitioner argues that, because *Terry* frisks of a person's *body*, *i.e.*, "a careful tactile exploration of the clothing on the suspect's body," are searches, any touching of *effects* also must constitute a search. Pet. Br. 14 ("'persons' receive no more protection * * * than the 'effects.'"). The differences in the items being touched, however, significantly affects application of the principle that governmental observation is a "search" only if it intrudes on a privacy expectation that society accepts as reasonable. See pp. 10-13, *supra*. Society has always accorded tremendous respect to each individual's privacy expectation that his person will not be subjected to uninvited touching. See *Terry*, 392 U.S. at 17 (frisk of person's clothing is "a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment"). But that same solicitude does not extend to the

[9] Petitioner's reliance on early accounts regarding searches of "travelers' portmanteaus and saddlebags," Pet. Br. 8 n.7, is likewise misplaced, because those reports do not address knowing exposure. Compare note 4, *supra* (discussing early travel). The "searches" discussed in those materials appear to have been what everyone would agree is a Fourth Amendment search—a process by which the luggage is opened and its contents visually inspected. See Benjamin Gale, *Brief Remarks on Several Laws* 44 (1782); William J. Cuddihy, *The Fourth Amendment: Origins and Original Meaning* 1518-1519 (1990).

handling or touching of bags and other containers checked with carriers or placed in common locations where they predictably will be touched, moved, and handled by others. Cf. *State* v. *Millan*, 916 P.2d at 1118 ("*Dickerson* involved police intrusions upon the person during a pat-down search while this case involves intrusions upon [luggage] relinquished to the possession of a third person in a public place. The former implicates privacy rights that the latter does not.").[10] Thus, while society generally respects every person's expectation that he will not be subject to rough grabbing or handling in most circumstances, it is both commonplace and accepted that luggage left in publicly accessible places shared with other passengers will be handled in ways that would be intolerable if directed at a person.

For similar reasons, Amicus NACDL is incorrect (Br. 13) to suggest that principles drawn from assault and battery cases support petitioner's position. This Court repeatedly has recognized that property and tort principles are at most "marginally relevant to the question of whether the Fourth Amendment has been violated." *Karo*, 468 U.S. at 713. See also *Silverman* v. *United States*, 365 U.S. 505, 511 (1961) (scope of Fourth Amendment not defined by the "ancient niceties of tort or real property law"). The NACDL's cases, moreover,

[10] Indeed, the quality of luggage is often promoted based on its ability to withstand such treatment. Perhaps the most famous example is American Tourister's so-called "Gorilla ad," which ran for fifteen years and was recently revived in revised form. The advertisement, in obvious reference to the rough treatment bags often receive, featured an ape hurling and beating an American Tourister suitcase, without causing perceptible damage. See Barbara Vancheri, *Perfect Pitches*, Pittsburgh Post-Gazette, June 30, 1999, at E1.

all recognize the longstanding distinction between an unconsented and offensive touching directed at the *person* (and matters, like the clothing worn, on the person) and such touching when directed at chattels or luggage. The former can be an assault or battery. The latter can be neither. See William L. Prosser & W. Page Keeton, *The Law of Torts* § 9, at 39-40 (5th ed. 1984); *Cole* v. *Turner*, 90 Eng. Rep. 958 (1705) ("[T]he least touching *of another* in anger is a battery.") (emphasis added).[11] Thus, none of the cases NACDL cites would have been actionable if the touching, rather than being directed at the person or an object intimately connected with the person, had been directed at chattels left in a shared and public location.[12]

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[11] It is highly questionable whether the Founders would have considered the mere unconsented touching of the exterior of a bag left in a publicly accessible location, absent injury to the bag or its contents, to be any sort of tort at all. Traditional tort actions protecting personal property, like trespass to chattel, required proof of meaningful interference with the owner's *possessory* interests. Prosser & Keeton, *supra*, § 14, at 85 (cases involving "carrying off" of, or damage to, chattel); Restatement (Second) of Torts § 218 (1965) (limiting liability for trespass to actions that "dispossess" another of chattel, impair the chattel, deprive the possessor of the chattel's use "for a substantial time" or cause bodily harm to the possessor).

[12] In *Fisher* v. *Carrousel Motor Hotel, Inc.*, 424 S.W.2d 627 (Tex. 1967), for example, the waiter did not merely "remove a plate from the table," NACDL Br. 13, but rather "forceful[ly] dispossess[ed]" the plaintiff of a plate, yanking it from his hand, 424 S.W.2d at 630; NACDL Br. 13. The court expressly recognized that, absent contact with either the plaintiff's body or an object in his hand, there would have been no assault or battery. See 424 S.W.2d at 629-630. Similarly, in *Jung-Leonczynska* v. *Steup*, 803 P.2d 1358 (Wyo. 1990), the defendant did not merely pound on the plaintiff's desk, but struck a book that was in or touching the plaintiff's hand; it was only because of that connection to the plaintiff's person that the suit was actionable. See 803 P.2d 1363 (dissenting opinion). The remaining cases cited by NACDL likewise all involved contact with people or objects on their person or in their grasp. See, *e.g.*, *Fields* v. *Cummins Employees Fed. Credit Union*, 540 N.E.2d 631, 640 (Ind. Ct. App. 1989) (proof of battery requires a harmful or offensive "contact with a person," and proof of assault requires an act that "creates an apprehension of" such "a harmful or offensive contact").

3. Petitioner, moreover, is incorrect to characterize the handling of a bag's exterior as "physically intrusive," Pet. Br. 10-12, or to argue that it reveals intimate details concerning the bag's contents, *id.* at 12-15.

Petitioner's claim of "physical intrusion" confuses the examination of the *exterior* of a bag with a search of its contents. When an officer touches the outside of a bag, he does not open it; he does not place his hands inside of it; and he does not "rummag[e] through [its] contents." See *United States* v. *Place*, 462 U.S. 696, 707 (1983) (noting that canine sniff does not involve opening luggage); *Ex Parte Jackson*, 96 U.S. at 733 ("Letters and sealed packages * * * in the mail are" not protected "from examination and inspection" as to "their outward form and weight."). At no time does he pierce the physical barrier the bag creates, and is intended to create, between the public and the bag's contents. Consequently, such an observation is not "physically intrusive" for constitutional purposes—as this Court's pre-*Katz* search-and-seizure cases readily attest. Compare *Goldman* v. *United States*, 316 U.S. 129 (1942) (where listening was accomplished by placing a device *against* a common wall without penetrating it, observations not a search) with *Silverman*, 365 U.S. at 509 (where listening "accomplished by means of an unau-

thorized physical penetration," observations amounted to a search).[13]

Nor does examining the exterior of a bag tend to reveal intimate details about its contents. Very few items have signature shapes that can be discerned from handling the exterior of a bag. As one state court has observed, "[i]t is difficult to imagine any contents of ordinary luggage that could be identified by feeling its exterior, except" large and solid objects like "marijuana packed in bricks, large amounts of powdered drugs, and guns." *State* v. *Quintanilla*, No. A-99-201, 1999 WL 1063085, at *6 (Neb. Ct. App. Aug. 11, 1999). Consequently, an officer's handling of a bag in general will "tell police very little about the contents, other than

[13] Indeed, before this Court's decision in *Katz* v. *United States*, 389 U.S. 347 (and its adoption of the "reasonable expectation of privacy" formula from Justice Harlan's concurring opinion in that case, *id.* at 360), the Court generally required a physical trespass as a precondition to finding a Fourth Amendment search. See *Olmstead* v. *United States*, 277 U.S. 438, 457 (1928); *Goldman*, 316 U.S. at 135. The Court reassessed that approach, and largely abandoned it in favor of the "reasonable expectations" test, in light of technological advances that might otherwise have eroded the privacy the Fourth Amendment was designed to protect. See *Ciraolo*, 476 U.S. at 214 (abandonment of trespass test and adoption of reasonable expectation test prompted by "observations about future electronic developments and the potential for electronic interference with private communications"). In this case, however, the government did not make its observations through technological means that could not have been anticipated by the Founders or even 19th century courts. Rather, it made the same observations that could have been made using techniques available since the dawn of travel. Where an individual does not even make the minimal effort needed to prevent a form of observation that has been known for centuries, it is hard to say his expectation of privacy is reasonable. See pp. 21-22, *supra* (individual must take "customary" precautions to preserve privacy).

drugs, in the luggage." *Ibid.* Moreover, when law enforcement officers pat, squeeze, grab, or compress luggage, they do not and cannot discern or explore intimate details about the bag's contents. Nor can they somehow "feel" their way "through the [bag's] various contents" from outside. Pet. Br. 13. Rather, contact with the outside of the bag permits them to sense only the presence, general shape, and hardness of relatively large and solid objects inside, and even then only if the objects are situated in a manner that exposes them to perception from outside the bag. The presence of such an object is not an intimate fact, and in any event is precisely what anyone else grabbing, compressing, or pushing on the bag during foreseeable handling might sense.

Passengers handling bags in a manner similar to the manner of Agent Cantu may not pay attention to what they sense, or know how to interpret it. But nothing bars government officers from using specialized knowledge to keep themselves alert to, and to help them interpret, that which any other member of the public might have sensed. See *Ciraolo*, 476 U.S. at 213 ("That the * * * officers were trained to recognize marijuana is irrelevant.").[14] Instead, so long as what government

[14] Cf. *Place*, 462 U.S. at 707 (dog sniff of luggage not a search). Although the Court in *Place* did not rely on the principle that what an individual knowingly exposes to the public is not protected by the Fourth Amendment, several lower courts, both federal and state, have relied on *Place* together with this principle to approve the limited touching that is required to prepare luggage for a canine sniff. See *McDonald*, 100 F.3d at 1326 n.7 ("Because the Supreme Court has approved the canine sniff, it follows that the Court would also likely approve some degree of police handling and manipulation of personal luggage in order to make the luggage accessible to the police dog."). See also *United States* v. *Lovell*, 849

agents sense could have been sensed by any other member of the public, no Fourth Amendment search has occurred. In this case, nothing in the record suggests that, when Agent Cantu touched or squeezed petitioner's bag, he sensed anything about its contents other than the fact that it had a relatively solid, large, brick-like object inside of it—information that could have been noted by anyone else handling the bag.[15]

B. Officers Are Not Limited To "Casual" Or "Incidental" Observations Of Matters Exposed To Their Senses

Petitioner also argues that, even though his gym bag was exposed to public touching, Agent Cantu's handling of it still must be considered a search. In particular, he contends that Cantu handled the "luggage in a manner calculated to reveal its contents," and did not restrict himself to the sort of "casual contact" that petitioner claims to have expected from fellow passengers. Pet. Br. 20. Petitioner thus seems to suggest that an officer violates the Fourth Amendment if he handles luggage

F.2d at 913; *United States* v. *Viera*, 644 F.2d 509, 510 (5th Cir.), cert. denied, 454 U.S. 867 (1981); *State* v. *Killean*, 907 P.2d 550, 555 (Ariz. Ct. App. 1995), vacated on other grounds, 915 P.2d 1225 (1996); *Lancelotti*, 595 N.W.2d at 563.

[15] Petitioner's emphasis on what might be "capable" of observation rather than on what was actually observed also ignores this Court's teachings that a Fourth Amendment inquiry must focus on what actually occurred in the case at hand, not on what might occur in some future case. See *Dow Chemical Co.* v. *United States*, 476 U.S. 227, 239 n.5 (1986) ("Fourth Amendment cases must be decided on the facts of each case, not by extravagant generalizations."); *United States* v. *Karo*, 468 U.S. 705, 712 (1984) ("[W]e have never held that potential, as opposed to actual, invasions of privacy constitute searches for purposes of the Fourth Amendment.").

placed in the overhead rack for the purpose of identifying contraband, or if he has more than "casual" or "incidental" contact with it. See also NACDL Br. 13-14.(only "incidental, harmless, or accidental touching is to be expected and * * * tolerated"). That proposed standard has no basis in this Court's cases; would be unworkable; and would not render the handling of the bag at issue here unlawful in any event.

1. To the extent petitioner's test turns on the fact that Agent Cantu touched the bag for the *purpose* of detecting narcotics, it is inconsistent with this Court's precedents. Indeed, at the same time petitioner repeatedly finds fault with any touching of the exterior of a bag that is "*calculated* to determine whether it contained drugs,"[16] he properly concedes that the purpose or reason for the agent's contact with the bag is irrelevant. Pet. Br. 14 ("subjective intent" does not determine "whether a Fourth Amendment search has occurred."). As this Court has explained, the fact that "police observation * * * was directed specifically at the identification" of contraband—even contraband inside a protected place—is "irrelevant." *Dunn*, 480 U.S. at 304-305. See *Ciraolo*, 476 U.S. at 212 (rejecting

[16] Pet. Br. 7 (emphasis added); Pet. Br. 9, 13 (touch unlawful if "aimed at" and "calculated to reveal items with a size, shape, density, or other characteristics" suggestive of narcotics); Pet. Br. 12-13 (handling a search if conducted "in an attempt to find drugs"); Pet. Br. 20 (bag touched "in a manner calculated to reveal its contents"). That error is duplicated by the cases on which petitioner relies. See *Gwinn*, 191 F.3d at 879 (The "traveling public would not expect their luggage * * * to be subject to a *calculated* and thorough squeezing.") (emphasis added); *Nicholson*, 144 F.3d at 639 ("tactile examination *aimed at discovering* the nature of the contents of the bag" violated defendant's "reasonable expectation of privacy in the bag") (emphasis added).

respondent's challenge to "the authority of government to observe his activity from any vantage point or place if the viewing is motivated by a law enforcement purpose, and not the result of a casual, accidental observation."); *Whren* v. *United States*, 517 U.S. 806, 813 (1996) (Court consistently "unwilling to entertain Fourth Amendment challenges based on the actual motivations of individual officers.").

Petitioner is also incorrect to argue that the handling of luggage exceeds constitutional bounds unless limited to the sort of "casual" or "incidental" handling petitioner claims to have expected from other passengers. As an initial matter, it is far from clear that the handling of luggage by other passengers is strictly "casual" and wholly unintrusive. As noted above, it is well known that passengers and common carrier employees often have substantial (and sometimes forceful) contact with stowed luggage. See pp. 13-19, *supra*. More fundamentally, whether or not an officer's observations constitute a search has never depended on whether the officer's manner of making the observation was the sort of "casual," "incidental," or "fleeting" observation expected from the general public. Instead, so long as the matter the officer observes is open to public perception, the officer may observe that matter carefully and closely, even if the public generally would not be as observant or take such advantage of the exposure.

Thus, in *United States* v. *Lee*, *supra*, this Court did not ask whether the boatswain's observation of contraband in open view on the ship's deck was different or more thorough than the observation expected of other members of the public, even though the boatswain used a search light. Likewise, in *Texas* v. *Brown*, *supra*, the Court did not ask whether the police officer's conduct, which consisted of shining a flashlight in the car

window, "chang[ing] [his] position," and "ben[ding] down at an angle so [he] could see what was inside," 460 U.S. at 740 (plurality opinion), exceeded the sort of casual observations expected of other passersby. Instead, because "[t]he general public could peer into the interior of" the automobile "from any number of angles," nothing barred the officer from peering into it from any, or all, of those angles as well. *Ibid.*; *id.* at 746, 750 (concurring opinions). And in *Ciraolo*, this Court rejected the defendant's and the dissent's contention that the officers' aerial observations were "searches" because, rather than limiting themselves to the "casual, accidental observation," 476 U.S. at 212, or "fleeting, anonymous, and nondiscriminating glimpse," that most members of the flying public would obtain, *id.* at 223 (dissenting opinion), the officers focused on the defendant's yard with the purpose of identifying marijuana. Instead, the Court held, the fact that the yard was knowingly exposed to observation from above rendered the asserted privacy expectation unreasonable. 476 U.S. at 213, 214 n.2.

Petitioner's contention that police officers are limited to making the same "casual" observations expected of members of the public is also at odds with this Court's decision in *United States* v. *Knotts*, *supra*. In *Knotts*, the police not only followed the defendant's car as it proceeded through public streets, but used a beeper (which was installed in a drum of chemicals sold to him) and a helicopter to do so. 460 U.S. at 278. Even though no one ordinarily expects others to observe their every movement for such an extended period of time—at most, they expect to be observed, casually and incidentally, by different people, in different places, at differ-

ent times[17]—this Court held that the police could make such observations because the defendant had "voluntarily conveyed to anyone who wanted to look the fact that he was traveling over particular roads in a particular direction, the fact of whatever stops he made, and the fact of his final destination." 460 U.S. at 281-282. In other words, because any member of the public could have observed any of defendant's conduct, the police were entitled to observe all of it.

The same analysis applies to an officer's use of his other senses, including touch. Just as an officer may make a visual observation from several different angles open to the rest of the public, see *Brown*, 460 U.S. at 740, so too may he touch a bag at different points or in distinct ways, so long as the bag was knowingly exposed to each. And just as an officer's visual observation is not converted into a search just because the officer looks more carefully than might a member of the public, *ibid.*; *Ciraolo*, 476 U.S. at 212 n.1, 213, so too an officer's "feel" of a publicly exposed soft bag does not become a search simply because it is more focused, calculated, or extensive than the public's ordinarily would be. Instead, when each observation the officer makes —each squeeze, pat, or grab of the bag—reveals only that which any other passenger might have sensed during foreseeable handling of the bag, the officer's observations do not infringe on a constitutionally protected privacy interest.

2. Petitioner claims support for his proposed rule—that officers are limited to the sort of "casual contact" allegedly expected from other members of the public—

[17] Indeed, extended observations, if conducted by ordinary members of the public, might be condemned as stalking or harassment.

from *Lo-Ji Sales, Inc.* v. *New York*, 442 U.S. 319 (1979). See Pet. Br. 29-30. As an initial matter, *Lo-Ji Sales* involved the search and seizure of potentially expressive materials, presumptively protected by the First Amendment, from an adult bookstore. That fact alone distinguishes it. As the Court recognized in *Lo-Ji Sales* itself, 442 U.S. at 326 n.5; accord *Macon*, 472 U.S. at 468 (citing *Lo-Ji Sales*), the First Amendment "imposes special constraints on searches for and seizures of material arguably protected by the First Amendment." No materials even arguably protected by the First Amendment are at issue here.

In any event, *Lo-Ji Sales* was not a case in which law enforcement officers merely observed publicly exposed materials more closely, more extensively, or less casually than allegedly expected of the public. Instead, the officers there opened and viewed matters that were closed to public observation. For example, the officers there unwrapped, and reviewed the contents of, magazines that had been "encased in clear plastic or cellophane wrappers" and thus that had their contents sealed against public inspection. See 442 U.S. at 323. Likewise the officers insisted on viewing films that, absent a payment the officers did not make, were also closed to public observation. *Id.* at 322-323, 328. Thus, far from limiting officers to touching or handling materials in the precise or "casual" manner expected of other customers, *Lo- Ji Sales* merely precludes officers from opening and viewing matters closed to public inspection. See also *Ex Parte Jackson*, 96 U.S. at 733 (same rule for sealed packages placed in the mail); contrast *Macon*, 472 U.S. at 469 (undercover officers may purchase and view the materials they pay for, as might other customers).

Finally, to the extent petitioner (Br 10-11) construes *Dickerson*, 508 U.S. at 378, and *Arizona* v. *Hicks*, 480 U.S. at 324- 325, as limiting officers to "casual" observations, those cases too are inapposite. As explained above, see pp. 24-26, *supra*, those cases were both applications of the rule that warrantless searches must be strictly confined to the exigency that gives rise to them. Neither involved the question here, which is whether an officer's observation of matters exposed to the *public*—*i.e.* matters that any other passenger handling the baggage might have observed—constitutes a "search" within the meaning of the Fourth Amendment.

3. Petitioner's proposed standard is also unworkable. Under it, an officer would be permitted to handle bags in overhead racks just as other passengers might, and would be required to terminate contact at the point that an ordinary passenger would. The extent and manner in which passengers and carrier employees might handle stowed bags in individual circumstances, however, may well depend on a host of subtle and potentially random factors unsuited for application by officers in the field.[18] The standard, moreover, would make for inconsistent decisions. Not only might one person's foreseeable handling be another's unexpected manipulation, but results might turn on nuances of language, as courts attempt to differentiate unconstitu-

[18] For example, one might speculate that, in an uncrowded bus with ample overhead space, passengers would expect only limited and relatively light handling of their bags, whereas a crowded bus with smaller bins might yield more, and more aggressive, handling. The acceptable scope of an officer's conduct surely should not depend on such subtleties. See *Whren*, 517 U.S. at 815 ("We cannot accept that the search and seizure protections of the Fourth Amendment are so variable, and can be made to turn upon such trivialities.") (citations omitted).

tional "manipulation" from mere pressing, grabbing, squeezing, or pushing that corresponds to foreseeable handling. Indeed, even though the Tenth Circuit adopted petitioner's proposed test just a year ago, its decisions already portend inconsistent results.[19]

C. Officer Cantu's Handling Of Petitioner's Gym Bag Did Not Meaningfully Differ From Reasonably Foreseeable Handling

Petitioner, in any event, overstates any differences between Agent Cantu's handling of his bag and that which might be expected of any other passenger. At the hearing, Agent Cantu testified that, when he "felt" a green bag as he exited the bus, he noted a brick-like object in it. J.A. 10. He further testified that, when he squeezes bags, he squeezes them "hard," but not so hard as to break anything. J.A. 15. Petitioner did not

[19] For example, the Tenth Circuit in *Nicholson* cited with approval Fifth Circuit decisions which upheld handling described as "a light press of the hands along the outside of a suitcase," *Viera*, 644 F.2d at 510, and the feeling of the sides of the bags followed by compressing to force air out, *Lovell*, 849 F.2d at 915. At the same time, however, it suppressed evidence seized from a checked bag because the agent felt "its sides with his hands perpendicular to the ground and flat." *Nicholson*, 144 F.3d at 640. See also *United States* v. *Gault*, 92 F.3d at 992 (no search where officer both "kick[ed] and lift[ed]" bag to determine "its weight"). The differences among those forms of handling are far from obvious. Indeed, sometimes the Tenth Circuit has relied on distinctions that surely do not make a difference. Thus, it attempted to reconcile its decision in *Nicholson* with the Seventh Circuit's decision in *McDonald* by noting that, in *McDonald*, "the court thrice repeated that the officer did not remove defendant's bag from the overhead rack during his initial contact with it." 144 F.3d at 638. Yet in *Nicholson* itself, the court suppressed evidence from a checked bag that was touched without being removed from the cargo hold. See 144 F.3d at 640.

offer any greater detail. He testified only that Agent Cantu "reached for [his] bag, and he shook it a little, and squeezed it, and then sniffed it." J.A. 18. Based on that testimony, the district court found only that Agent Cantu "felt the outside of [petitioner's] softside green cloth bag," J.A. 23, and characterized that action as a "minimally intrusive touching," J.A. 28.

Combining Agent Cantu's description of what he did with what that permitted him to feel (the presence of a relatively hard brick-like object, J.A. 10-11, with edges, J.A. 12, that was covered in a lighter layer, J.A. 11), petitioner attempts to paint a picture of extensive contact between Agent Cantu and the bag. See Pet. Br. 3, 18-19 (describing it as "manipulation" and "squeezing and feeling"). But neither the record nor the district court's findings support that picture. Agent Cantu apears to have "felt" the bag once, apparently through a squeeze, and thereby discerned the brick-like object and the characteristics he described. See pp. 20-21 & note 8, *supra*. But even if one were to assume that the "feel" and the "squeeze" were separate actions, they hardly exceed the sort of grabbing, pressing, squeezing, or pushing one might expect of other passengers or common carrier employees as they remove, replace, or rearrange previously stowed luggage to make room for or retrieve other bags. See pp. 13-19, *supra*. Because Agent Cantu's handling of petitioner's bag in this case did not reveal, or permit observation of, anything that could not have been observed by anyone else handling the bag, it violated no constitutionally protected privacy expectation.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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